# Ang Peng Chin v Perbadanan Tabung Amanah Islam Brunei (TAIB) & Ors

HIGH COURT (BRUNEI DARUSSALAM) — ORIGINATING SUMMONS NO 68 OF 2009
KIFRAWI CHIEF JUSTICE
20 JULY 2010

*Equity — Assignment — Sale of property — Developer obtaining financial facilities from third party for development of commercial complex — Benefits, interests and rights accruing to developer assigned to third party as security — Developer subsequently entering into sale and purchase agreement with purchaser for sale of units in commercial complex — Whether assignment in favour of third party absolute assignment — Whether purchaser's equity defeated by assignment*

*Equity — Competing equities — Priority — Notice of equity — Developer entering into sale and purchase agreement with purchaser for sale of units in commercial complex — Benefits, interests and rights accruing to developer assigned to third party as security for financial facilities — Assignment recited in preamble to sale and purchase agreement with purchaser — Whether purchaser had actual notice of assignment — Whether purchaser's equity defeated by assignment*

The second defendant ('Morsima') was the developer of a commercial building project ('the development'). In return for financial facilities obtained from the first defendant ('TAIB'), Morsima assigned to TAIB on 20 April 2002 vide three deeds of assignment, all its rights and interests in the development, including rentals and sales proceeds. On 22 October 2003, the plaintiff executed a sale and purchase agreement ('S & P') with Morsima in respect of two units in the development. The plaintiff also obtained a sub-lease in respect of the two units. Preamble E to the S & P clearly recited, inter alia, that TAIB was entitled by way of security to Morsima's rights and benefits under the development. Clause 6.4 of the S & P also provided that all payments by the plaintiff towards the purchase price had to made to Morsima's account with TAIB. However, the plaintiff paid a sum of B$485,000 towards the purchase price for the two units directly to Morsima, leaving a sum of B$15,000. TAIB later demanded B$415,000 from the plaintiff allegedly as balance of the purchase price. The plaintiff informed TAIB of the B$485,000 payment to Morsima. The plaintiff also notified TAIB that he was willing to pay the B$15,000 balance upon TAIB's undertaking to transfer the property to him. When TAIB failed to respond, the plaintiff sought a declaration that he was the

beneficial owner of the two units and for an order compelling TAIB and Morsima to transfer the units to him on full payment of the purchase.

**Held**, dismissing the plaintiff's application with costs:

(1) The S & P between the plaintiff and Morsima was signed after the assignments in favour of TAIB were executed. In the instant case, TAIB had obtained an absolute assignment of Morsima's rights before Morsima had entered into the S & P with the plaintiff. It was impossible for TAIB to give notice to the plaintiff on 20 April 2002 when the assignments were executed because the plaintiff had signed the S & P on 22 October 2003 (see para 25).

(2) Both in law and in equity, the basic rule is that rights and interests primarily rank in order of creation. Therefore, in the instant case the plaintiff's claim was subject to a prior absolute assignment in favour of TAIB. An important qualification to the basic rule is the doctrine of the purchaser without notice. A subsequent purchaser must have no notice of the earlier equitable interest. From this doctrine it is clear that a subsequent purchaser is affected by notice of an equity when there is actual notice, constructive notice and imputed notice (see para 33); *Bank of Tokyo Ltd v Mohd Zaini bin Arshad (Maria Pragasam, intervenor)* [1991] 3 MLJ 50 referred.

(3) In the instant case the plaintiff had actual notice of the assignment by Morsima in favour of TAIB as shown in the preamble E of the S & P which stated that in consideration for financing facilities extended to Morsima by TAIB, TAIB was entitled by way of security to Morsima's rights and benefits under the development agreement and the developer's share (see para 35).

(4) In the instant case, the plaintiff failed to pay the purchase money to Morsima's account with TAIB as required by the S & P agreement dated 22 October 2003. The plaintiff therefore was in breach of the agreement. The plaintiff's conduct in not complying with the provisions of the S & P would mean the plaintiff did not deserve to be saved by equity. TAIB should not therefore be estopped from claiming priority. The plaintiff and Morsima had also failed to obtain consent from TAIB for the sale or lease or sublease of the properties as required by the assignments. Equity clearly could not come in aid of a party which had breached the agreement (see para 36).

**[Bahasa Malaysia summary**

Defendan kedua ('Morsima') adalah pemaju projek pembangunan perdagangan ('pembangunan'). Sebagai balasan kemudahan kewangan yang diperoleh daripada defendan pertama ('TAIB'), Morsima menyerahkan kepada TAIB pada 20 April 2002 melalui tiga surat ikatan perjanjian, kesemua

haknya dan kepentingan di dalam pembangunan, termasuk hasil kutipan sewa dan jualan. Pada 22 Oktober 2003, plaintif melaksanakan perjanjian jual beli ('J & B') dengan Morsima berkaitan dua unit di dalam pembangunan tersebut. Plaintif juga memperoleh pajakan kecil berkaitan kedua-dua unit tersebut. Mukadimah E kepada J & B tersebut jelas menyatakan, antara lain, bahawa TAIB berhak melalui sekuriti hak dan Morsima di bawah pembangunan tersebut. Klausa 6.4 J & B juga memperuntukkan bahawa kesemua pembayaran oleh plaintif terhadap harga belian hendaklah dibuat kepada akaun Morsima dengan TAIB. Walau bagaimanapun, plaintif membayar sejumlah B$485,000 terhadap harga belian untuk kedua-dua unit terus kepada Morsima, meninggalkan baki sejumlah B$15,000. TAIB kemudiannya menuntut B$415,000 daripada plaintif kononnya sebagai baki harga belian. Plaintif memberitahu TAIB mengenai bayaran B$485,000 kepada Morsima. Plaintif juga memberitahu TAIB bahawa dia sanggup membayar baki B$15,000 atas perjanjian TAIB untuk memindah hartanah tersebut kepadanya. Apabila TAIB gagal untuk memaklum balas, plaintif memohon perisytiharan bahawa dia adalah pemilik benefisiari kedua-dua unit tersebut dan untuk perintah memaksa TAIB dan Morsima memindahkan unit-unit tersebut kepadanya atas bayaran penuh harga belian tersebut.

**Diputuskan,** menolak permohonan plaintif dengan kos:

(1) J & B di antara plaintif dan Morsima ditandatangani selepas penyerahan hak memihak TAIB dilaksanakan. Dalam kes ini, TAIB telah memperoleh penyerahan hak mutlak hak Morsima sebelum Morsima menandatangani J & B dengan plaintif. Adalah tidak mungkin untuk TAIB memberi notis kepada plaintif pada 20 April 2002 apabila penyerahan hak dilaksanakan kerana plaintif telah menandatangani J & B tersebut pada 22 Oktober 2003 (lihat perenggan 25).

(2) Dari segi undang-undang dan ekuiti, peraturan-peraturan asas adalah bahawa hak dan kepentingan dibariskan secara utama mengikut pewujudan. Oleh itu, dalam kes ini tuntutan plaintif adalah tertakluk kepada penyerahan hak mutlak yang terdahulu yang memihak TAIB. Kelayakan penting kepada peraturan asas adalah doktrin pembeli tanpa notis. Pembeli kedua tidak perlu diberikan notis kepentingan ekuiti yang terdahulu. Daripada doktrin ini jelas bahawa pembeli kedua terjejas oleh notis ekuiti apabila terdapat notis sebenar, notis konstruktif dan notis dikatakan (lihat perenggan 33); *Bank of Tokyo Ltd v Mohd Zaini bin Arshad (Maria Pragasam, intervenor)* [1991] 3 MLJ 50 dirujuk.

(3) Dalam kes ini plaintif mempunyai notis sebenar penyerahan hak oleh Morsima memihak TAIB seperti yang ditunjukkan di dalam Mukadimah E J & B yang mana menjelaskan bahawa dalam balasan

untuk kemudahan kewangan yang diberikan kepada Morsima oleh TAIB, TAIB berhak melalui sekuriti hak dan kepentingan Morsima di bawah perjanjian pembangunan dan syer pemaju (lihat perenggan 35).

(4) Dalam kes ini, plaintif gagal membayar wang belian ke akaun Morsima dengan TAIB seperti yang dikehendaki oleh perjanjian J & B bertarikh 22 Oktober 2003. Plaintif oleh itu memungkiri perjanjian tersebut. Tindakan plaintif dalam tidak mematuhi peruntukan-peruntukan J & B akan bermaksud plaintif tidak berhak diselamatkan oleh ekuiti. TAIB oleh itu tidak patut diestop daripada tuntutan keutamaan. Plaintif dan Morsima juga gagal untuk memperoleh izin daripada TAIB untuk jualan atau pajakan atau pajakan kecil hartanah tersebut seperti yang dikehendaki oleh penyerahan hak tersebut. Ekuiti jelas tidak dapat membantu pihak yang telah memungkiri perjanjian tersebut (lihat perenggan 36).]

**Notes**

For a case on priority, see 6 *Mallal's Digest* (4th Ed, 2009 Reissue) para 2601.
For cases on assignment generally, see 6 *Mallal's Digest* (4th Ed, 2009 Reissue) paras 2577–2597.

**Cases referred to**

*Bank of Tokyo Ltd v Mohd Zaini bin Arshad (Maria Pragasam, intervenor)* [1991] 3 MLJ 50, HC (refd)
*Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, FC (refd)
*Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481, SC (refd)
*Public Finance Bhd v Scotch Leasing Sdn Bhd (in receivership) (Perwira Habib Bank Malaysia, intervener)* [1996] 2 MLJ 369; [1996] 2 AMR 2261, FC (refd)
*UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365; [1996] 1 AMR 238, FC (refd)

**Legislation referred to**

Law of Property Act 1925 [UK] s 136

*Rudi Lee (Fathan Rudi Lee Associates) for the plaintiff.*
*YC Lee (YC Lee and Lee) for the first defendant.*

**Kifrawi Chief Justice:**

INTRODUCTION

**[1]** The plaintiff in this case applies for the following orders against the defendants in this originating summons:

(a) a declaration that the plaintiff is the beneficial owner of shop units 32

and 33 forming parts of a commercial building being erected on land described as EDR BD 42848, Lot No 47406, Kampong Jaya Setia, Mukim Berakas Brunei;

(b) an order compelling the first defendant ('TAIB') and second defendant ('Morsima') to transfer the shop units to the plaintiff upon full payment of the purchase price; and

(c) costs and court fees.

**[2]** The plaintiff's application is supported by his affidavit dated 25 July 2009. The first defendant objected to the application. The objection is outlined in the affidavit of the first defendant's — Executive Officer, Corporate and Trade Division, Portfolio Management Department, Hjh Zazarina bt Hj Zainuddin, dated 27 August 2009.

THE PLAINTIFF'S SUBMISSION

**[3]** Counsel for the plaintiff submitted, inter alia, as follows:

… Brief Statement of Relevant Facts

3 The properties under dispute are shop units 32 and 33 in a commercial building, more popularly known as the 'Airport Mall'. The timeline of events are as follows:

(a) On 7th October 1997, Hj Karim Bin Md Salleh appointed 3rd Defendant Wong Yep Ming ('Wong') under a Development Agreement to develop and build a commercial complex on Hj Karim's land. (See Tab 1, 1st Defendant's Affidavit).

(b) The Development Agreement was subsequently varied under separate Deeds of Variation dated 10th December 1998, 13th May 1999 and 2nd June 2002. (See Tab 2, 1st Defendant's Affidavit).

(c) Pursuant to the Development Agreement, Hj Karim granted a Power of Attorney and an undated Lease to Wong. (See Tab 3 and 4, 1st Defendant's Affidavit).

(d) On 15th April 2002, Wong entered into a Building Contract with 2nd Defendant Morsima Sdn. Bhd. (See Tab 5 1st Defendant's Affidavit). On the same date, Wong assigned vide a Deed of Assignment all of his rights and interest in the Development Agreement to Morsima. (See Tab 5, 1st Defendant's Affidavit).

(e) Pursuant to the Deed of Assignment, Wong granted a Substitute Power of Attorney and an undated Deed of Assignment of Lease to Morsima. (See Tab 7 and 8, 1st Defendant's Affidavit).

(f) Morsima obtained facility agreement from TAIB (See Tab 9, 10, 1st Defendant's Affidavit). On 20th April, 2002, Morsima assigned to TAIB vide three separate Deeds of Assignment its rights and interest in the

Development Agreement, its leasehold rights and right to rentals and sales proceeds. (See Tab 11–12, 1st Defendant's Affidavit).

(g) On 22nd October 2003, the Plaintiff entered into a Sale and Purchase Agreement ('S&P Agreement') with Morsima in respect of Shop Units 32 and 33. The Plaintiff was also granted a sublease in respect of the said shop units. (See APC–1 and APC–2, Plaintiff's Affidavit).

(h) In accordance with the S&P, the Plaintiff paid the purchase price to Morsima. The Plaintiff had paid BND$485,000 towards the purchase price. (See APC3–5, Plaintiff's Affidavit), leaving a balance of BND15,000.

(i) On 26th March 2009, TAIB demanded BND$415,000 from the Plaintiff allegedly as balance of the purchase price. (See APC–6, Plaintiff's Affidavit)

(j) Vide letter dated 23rd April 2009, the Plaintiff informed TAIB of the BND$485,000 payment and notified TAIB that the Plaintiff is willing to pay the BND$15,000 balance upon TAIB's undertaking to transfer the property to the Plaintiff. (See, APC–7, Plaintiff's Affidavit). TAIB failed to reply. Hence, the Plaintiff was constrained to file the present OS.

DISCUSSION

**[4]** The crux of the present application hinges on two legal issues:

(a) First, the terms and legal effect of the three deeds of assignments between Morsima and TAIB.

(b) Second, the correct construction of cll 6.1 and 6.4 of the S & P agreement between the plaintiff and Morsima.

**[5]** As to the first legal issue, we submit the following:

(a) The three deeds of assignment between TAIB and Morsima cannot prejudice the plaintiff because TAIB did not give the required notice of assignment to the plaintiff.

(b) Further, even assuming that there was notice, TAIB is estopped from claiming priority of right because TAIB had clothed Morsima with full and apparent authority to act as its agent and/or trustee to deal with the plaintiff in respect of the subject shop houses. As principal, TAIB is bound by the acts of its agent and trustee.

**[6]** As to the second legal issue, we submit the following:

(a) Clauses 6.1 and 6.2 must be construed as requiring the plaintiff to pay the purchase directly to Morsima, who will then deposit/remit the money to its TAIB bank account or hold the said money in trust for TAIB.

(b) At any rate, the plaintiff did pay the purchase price to Morsima, which payment is not disputed by TAIB.

(c) Further, TAIB is barred and estopped from claiming non-payment because of the absence of a notice of assignment and lack of privity of contract with the plaintiff. Further, as principal, TAIB is bound by the acts of its agent Morsima.

NO WRITTEN NOTICE OF ASSIGNMENT TO THE PLAINTIFF

**[7]** No notice of assignment was given by TAIB to the plaintiff in respect of the deed of assignment of development agreement (developer's share), deed of assignment of leasehold rights and deed of assignment of rentals and sales proceeds.

**[8]** The absence of such notice is fatal to TAIB's claim of priority. We rely on the following authorities:

(a) Notice necessary as between assignee ('TAIB') and debtor ('the plaintiff'). In order to make the assignee's title effective against the debtor or fund holder and third parties notice of assignment must be given to the debtor or fund holder though no assent or acquiescence on the part of the debtor or fund holder is necessary.

(b) Payment to assignor before notice to debtor. If no notice is given to the debtor or other fundholder the assignee ('TAIB') will have to give credit to him for any payment made by him ('the plaintiff') to the assignor ('Morsima') while he is in ignorance of the assignment (see *Halsbury's Laws of England*, Vol 6 at p 32; the plaintiff's bundle of authorities at p 22).

(c) *Public Finance Bhd v Scotch Leasing Sdn Bhd (in receivership) (Perwira Habib Bank Malaysia, intervener)* [1996] 2 MLJ 369; [1996] 2 AMR 2261; the plaintiff's bundle of authorities at pp 48–49.

(d) *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365; [1996] 1 AMR 238; the plaintiff's bundle of authorities at p 59.

**[9]** Accordingly, we submit that TAIB's title arising from the three deeds of assignment is not effective as against the plaintiff because of absence of notice of assignment. Further, because of the lack of notice, TAIB, as assignee, must give credit to the plaintiff for all payments made to the assignor Morsima. Thus, the plaintiff should be deemed to have paid BND$485,000 towards the purchase price.

MORSIMA ACTED AS AGENT AND/OR TRUSTEE OF TAIB

**[10]** We say that Morsima is the agent/trustee of TAIB in respect of the S & P agreement with the plaintiff. We rely on the following:

(a) Clause 2, deed of assignment of development agreement between Morsima and TAIB — 'Morsima assigning to TAIB all its rights, title and interest under the Development Agreement' (see at p 4, Tab 11, the plaintiff's affidavit).

(b) Clause 4(iv), deed of assignment of development agreement between Morsima and TAIB — 'The Assignor (Morsima) shall not, without the consent in writing of Perbadanan (TAIB), sell, lease, assign or otherwise dispose of said Properties or any part thereof to any person or persons' (see the defendant's affidavit at p 5, Tab 11).

(c) Clause 1 of the deed of assignment of rentals and sales proceeds development agreement between Morsima and TAIB — 'The Assignor (Morsima) assigning to Perbadanan (TAIB) absolutely all Assigned Moneys TO HOLD the same unto Perbadanan (TAIB)' (see the defendant's affidavit at p 4, Tab 13).

(d) Clause 3(b) of the deed of assignment of rentals and sales proceeds development agreement between Morsima and TAIB — 'In the event that the Assignor (Morsima) receives payment of any part of the Assigned Moneys, the Assignor shall forthwith pay the same to Perbadanan (TAIB) and until paid over such moneys shall be held in trust for Perbadanan (TAIB)' (see at the defendant's affidavit at p 5, Tab 13).

**[11]** We say that TAIB should have been the vendor in the S & P agreement because, at the time of the sale, TAIB had already acquired all rights, title and interest of Morsima in the development agreement. Morsima could not have sold the shop units to the plaintiff on its own accord because Morsima, at the time of the sale, no longer had any right over the shop units having earlier relinquished the same to TAIB.

**[12]** *But* cl 4(iv) of the deed of assignment of development agreement allowed Morsima to sell the shop houses to the plaintiff provided that Morsima obtain the *written consent of TAIB*. We submit that this clause created a relationship of agency between Morsima and TAIB. By allowing Morsima to sell the shop units to the plaintiff when it had no authority to do so, TAIB constituted Morsima as its agent in selling the shop units to the plaintiff.

**[13]** Further, by its acts, silence or inaction, TAIB had clothed Morsima with real and apparent authority to deal with the plaintiff in respect of the shop units:

(a) TAIB failed to give notice to the plaintiff of the three deeds of assignment. Further, TAIB failed to duly notify the plaintiff to deposit the purchase price directly to its nominated account.

(b) TAIB allowed Morsima to deal with the plaintiff despite having previously assigned all its rights and interest to TAIB.

(c) Further, TAIB allowed Morsima to deal, negotiate and transact with the plaintiff in relation to the S & P agreement. TAIB failed to monitor, control and supervise Morsima in relation to the S & P agreements.

(d) TAIB allowed Morsima to draft the S & P agreement. If TAIB had exercised due diligence, it should have reviewed and amended the S & P agreement to clearly provide payment of the purchase price directly to its nominated bank account, not to Morsima.

(e) TAIB allowed Morsima full reign in demanding progress payments from the plaintiff.

(f) TAIB failed to limit the authority of Morsima.

Authorities: *Halsbury's Laws of England*, Vol 1(2) at p 25; the plaintiff's bundle of authorities at p 70.

**[14]** Further, we say that Morsima is a *trustee* of TAIB in respect of moneys received by the plaintiff. Clause 3(b) of the deed of assignment of rentals and sales proceeds between Morsima and TAIB provides that should Morsima receives payment of any part of the assigned moneys, which included the purchase price for the property, Morsima *shall forthwith pay the same to TAIB and until paid over such moneys shall be held in trust for TAIB*.

**[15]** We submit that cl 3(b) created a relationship of agency and trust between Morsima and TAIB. By virtue of cl 3(b), Morsima became the *collecting agent* of TAIB with obligation to remit payment to TAIB. More importantly, Morsima became a *trustee* of the moneys paid by the plaintiff.

**[16]** Accordingly, any payment by the plaintiff to Morsima is a valid payment under cl 3(b). More importantly, regardless of whether Morsima in fact remit the plaintiff's payment to TAIB, the payment will still be considered as valid because the payments are *deemed moneys held in trust by Morsima for TAIB.*

(a) *Halsbury's Laws of England* at p 43; the plaintiff's bundle of authorities at p 72.

(b) *Halsbury's Laws of England* at p 94; the plaintiff's bundle of authorities at p 77.

CLAUSE 6 OF THE S & P AGREEMENT

**[17]** We submit that cll 6.1 and 6.4 of the S & P agreement must be construed as requiring the plaintiff to pay the purchase directly to Morsima, who will then deposit/remit the money to its TAIB bank account or hold the said money in trust for TAIB:

(a) TAIB failed to give notice to the plaintiff of the three deeds of assignment with explicit instruction to deposit the purchase price to its nominated bank account.

(b) Clause 6.1 expressly provides *that the purchase price shall be paid to the vendor (Morsima) by installments*. By cl 6.1, the plaintiff is required to pay *directly* to Morsima.

(c) Clause 6.4 which relied upon by the first defendant as requiring payment to a TAIB account is unclear and ambiguous. For one, cl 6.4 does not provide the exact account in which the payment must be made. More importantly, the clause is *silent* on who should deposit the purchase price in the vendor's account with TAIB.

To harmonise and give legal effect to both cll 6.1 and 6.4, we submit that cl 6.1 required the plaintiff to pay the purchase price directly to Morsima who shall, by virtue of cl 6.4, deposit the money to its TAIB account.

(d) We find comfort in this interpretation in cl 3(b) of the deed of assignment of rentals and sales proceeds where TAIB had authorised Morsima to act as its collecting agent and/or trustee in respect of assigned moneys which include the plaintiff's payment of the purchase price.

(e) Further, we also find comfort in this interpretation in the progress payment letters of Morsima to the plaintiff (see APC3–APC5 of the plaintiff's affidavit) where it is stated that:

> Every Payment is made direct to Morsima Sdn Bhd, A/C No. 002–3–068056–6 (TAIB).

Again, there is no mention on who should make the deposit into the Morsima's TAIB account. Further, it must be noted that the phrase used is 'is made', not 'should be made', thereby implying that the plaintiff is still under an obligation to make direct payment to Morsima under cl 6.1 of the S & P agreement, with Morsima under a correlative obligation to deposit said payment to its TAIB account.

**[18]** In any case, it remains undisputed that the plaintiff did and in fact paid the purchase price to Morsima. The fact of payment is undisputed and is evident from the records (see para 6 of the plaintiff's affidavit). TAIB cannot dispute the payment because:

(a) By its action, TAIB opted not to be a party to the S & P agreement. Instead, TAIB gave authority to Morsima, as its agent, to enter into the S & P agreement with the plaintiff pursuant to cl 4(iv) of the deed of assignment of development agreement.

(b) TAIB allowed Morsima to act as its collecting agent by virtue of cl 3(b) of the deed of assignment of rentals and sales proceeds (see discussion in 14–15 above).

(c) Morsima is a trustee of TAIB in respect of all payments made by the plaintiff, which are unremitted to TAIB by virtue of cl 3(b) of the deed of assignment of rentals and sales proceeds (see discussion in 14–15 above).

**[19]** In any case, we say that any failure by the plaintiff to comply with cl 6.4 of the S & P agreement is a breach of contract, which would only entitle Morsima to damages. The fact of payment by the plaintiff still stands and remains undisputed. There is nothing in the S & P agreement, which invalidates and renders void the payments made by the plaintiff directly to Morsima in accordance with cl 6.1 of the S & P agreement.

TAIB IS ESTOPPED AND BARRED FROM CLAIMING NON-PAYMENT

**[20]** As above, Morsima acted as agent and trustee of TAIB (see discussions in 10–16 above). Further, TAIB had clothed Morsima with real and apparent authority to deal with the plaintiff (see discussion in 13 above).

**[21]** Clause 3(b) of the deed of assignment of rentals and sales allowed Morsima to act as the collecting agent and trustee of TAIB. In other words, any payment by the plaintiff to Morsima as collecting agent is a valid payment by virtue of cl 3(b). Further, regardless of whether Morsima have remitted the payment to TAIB, there is still valid payment because the payments are deemed moneys held in trust by Morsima for TAIB.

**[22]** In conclusion, we submit that:

(a) TAIB cannot claim priority of right over the plaintiff because of the absence of notice of assignment.

(b) Even assuming that there was notice, TAIB is estopped from claiming priority because TAIB allowed Morsima to act as its agent and trustee.

(c) Further, TAIB clothed Morsima with real and apparent authority to deal with the plaintiff.

(d) Direct payment by the plaintiff to Morsima is valid payment under the S & P agreement.

(e) Morsima is a collecting agent and trustee of TAIB. Accordingly, payment of the plaintiff to Morsima is deemed payment to TAIB.

(f) TAIB is barred and estopped from claiming non-payment.

**[23]** In sum, we pray an order in terms of the originating summons. We also pray that the defendants pay the cost of this application and for other reliefs which this court deems just and equitable under the circumstances.

THE FIRST DEFENDANT'S SUBMISSION

**[24]** Counsel for the first defendant submitted as follows:

(a) TAIB opposes the plaintiff's application on the basis that the S & P agreement is subject to a prior claim in favour of TAIB; that the plaintiff failed to pay TAIB the purchase price in accordance with the S & P and the plaintiff obtained a sub-lease from the second defendant who had no right at the material time to grant the sub-lease as it had already assigned its interest in the development agreement to TAIB.

(b) The material sections of the assignment of development agreement in favour of TAIB dated 20 April 2020 reads:

> Reference: HZ TAB11
>
> Clause 2
>
> For the consideration aforesaid the Assignor as beneficial owner and as a continuing security for payment of all amount drawn and outstanding and all other sums payable ... *HEREBY ASSIGNS to Perbadanan ABSOLUTELY all the Assignor's rights title and interest in and under the Deed of Assignment of Development Agreement* and the full benefit granted thereby, the right of the Assignor to the full and absolute ownership of the said Properties and all remedies for enforcing the same ...

A

Clause 4(iv)

The Assignor (2nd Defendant) shall not, *without the consent in writing* of Perbadanan, sell, lease, assign or otherwise dispose of the said Properties or any part thereof to any person or persons.

B

C

Clause 6

Upon default by the Assignor in the manner above Perbadanan shall be entitled to exercise simultaneously and/or in any order or sequence all or any combination of the rights and powers following:

D

(ii) Perbadanan shall have *right and power of sell, lease, assign or otherwise dispose of the said Properties or any part thereof free from any interest of the Assignor* for such proceed, rent or fee as Perbadanan in its absolute discretion shall think fit ...

E

(c) In addition, the second defendant also assigned, pursuant to a deed of assignment of leasehold rights dated 20 April 2002 its leasehold rights in the properties to TAIB: HZ TAB12.

(d) Material section of this deed reads:

F

Clause 1.1

... The Assignor as beneficial owner of the Property HEREBY ASSIGNS unto Perbadanan every and all of the Assignor's rights title and interest in and to the said Property and the full and entire benefits and advantages of and under the said Property and the Lease and all remedies thereunder...

G

Clause 2.2

For the consideration stated aforesaid, the Assignor convenants that this Assignment is irrevocable by the Assignor for as long as the Assignor has not fully paid the Indebtedness to Perbadanan.

H

Clause 4.4 The Assignor covenants with Perbadanan as follows:

I

4.43

That he will not sub-lease let out or grant any license or otherwise howsoever part with possession or make or accept surrender of any sub-lease whatsoever of or in respect of the said Property or any part thereof to any person firm or company *without the consent in writing* of Perbadanan

first had and obtained which consent may be given or refused without furnishing any reason therefore, either absolutely or on such terms and conditions as Perbadanan deems fit and the decision of Perbadanan shall be final and conclusive.

Clause 5 Upon default by the Assignor to repay the Indebtedness ... Perbadanan shall be entitled to exercise all or any of the rights and powers following:

5.1 the right to take possession of the said Property;

5.2 the right to sell and assign the said Property.

(e) The second defendant also assigned all its rights and entitlement to rental and sale proceeds of the properties pursuant to a deed of assignment of rentals and sale proceeds dated 20 April 2002: HZ TAB13.

(f) The material provisions of this deed are:

Clause 1

In consideration of Perbadanan agreeing to grant or continuing to grant to the Assignor the facilities, the Assignor being legally and/or beneficially entitled to the Assigned Property HEREBY ASSIGNS to Perbadanan ABSOLUTELY all the Assigned Moneys TO HOLD the same unto Perbadanan.

'Assigned Money' refers to the rental proceeds and the proceeds of sale and any other proceeds whatsoever due or to become due, paid or to be paid to or for the account of the Assignor of whatever nature, arising out of or as a result of the Assignor's tenancies or sale or other disposal of ... the Assigned Property.

(g) It is important to note that S & P dated 22 October 2003 was signed after the assignments in favour of TAIB referred to above.

(h) Preamble E to the S & P reads:

By a Deed of Assignment of Development Agreement (Developer's Share), Deed of Assignment (Rentals and Sale Proceeds), Deed of Assignment of Leasehold Rights (By way of Security) all dated 20th April 2002 and other documents entered into between the Vendor and Perbadanan ... In consideration for financing facility extended to the Vendor by Perbadanan ... is *entitled to by way of security the Vendor's rights and benefits under the Development Agreements and the Developer's share.*

(i) Further material provisions of the S & P reads:

Clause 6.4

> *All payments by the Purchase (Plaintiff) towards the Purchase Price shall be made to the Vendor's account with PERBADANAN TABUNG AMANAH ISLAM BRUNEI.*

Clause 6.5

> *No change of the account to which the payments are to be made is valid unless consented to in writing by the Perbadanan Tabung Amanah Islam Brunei.*

(j) At law, as in equity, the basis rule is that rights and interests primarily rank in order of creation.

(k) The second defendant granted TAIB an absolute assignment: see the case of *Bank of Tokyo Ltd v Mohd Zaini bin Arshad (Maria Pragasam, intervenor)* [1991] 3 MLJ 50 (the developer purchased land, obtained loan and assigned interests in the agreement to the bank. The developer subsequently sold property to a purchaser).

(l) In *Bank of Tokyo*, a subsequent purchaser was held to be affected by notice of an equity when there is actual, constructive or imputed notice on his part. The intervenor (subsequent purchaser) had had actual notice of the assignment in favour of the bank as manifested in the recital of the agreement between the defendant and the intervenor. The court also held that the bank assignment was an absolute assignment.

(m) Lim Beng Choon J further stated:

> I still need to consider the second question posed earlier, namely, which of the two parties has the better equity? In my search for an answer to this question I must bear in mind that at law, as in equity, the basis rule is that rights and interests primarily rank in order of creation — he who is earlier in time is stronger in law — will apply where the equities are equal and neither claimant has the legal estate. A qualification to the basis rule is the doctrine of the purchaser without notice. A subsequent purchaser must have no notice of the earlier equitable interest. From this doctrine, it is clear that a subsequent purchaser is affected by notice of an equity when there is ... actual notice ... Now in the present case, the bank assignment was executed on 8 December 1982 while the intervenor's assignment was executed on 17 November 1983. There is no doubt that the intervenor had had actual notice of the bank assignment as manifested in the recital of the S & P ... Under such circumstances and bearing in mind the principles enumerated above, it is manifestly clear that the plaintiff, has an equity which, in my opinion, is better than that of the intervenor.

(n) In *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, where the developer sold land to a purchaser and

subsequently charged interest in land to the bank (finance company), the court held in favour of the bank (finance company), dismissing the argument of counsel for the purchaser that it acquired a beneficial or equitable interest in the property from the time the agreement of the sale and purchase of the property was signed; or that the defendant developer at that point in time was a 'trustee' for the plaintiff.

(o) The court held that the contractual events which result in the vendor becoming a bare trustee of the land for the purchaser, is on completion of the sale and purchase agreement, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land. It is not a correct description of the relationship between the parties of a contract of sale and purchase that from the time the contract was concluded, the vendor is a trustee for the purchaser because, at that stage, they are only parties to a contract of sale and purchase. At the time the finance company's charge was created and registered, the developer was not yet a trustee of the purchaser under the agreement.

(p) In *Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481 (the developer obtained a loan from and charged the land to a finance company. The developer subsequently sold the apartment built on the land to the purchaser who paid in full to the developer but the developer defaulted on its loan obligation), it was held that the purchaser had executed the sale and purchase agreements with notice of the charge and they must accept the purchase subject to the registered charge. Its application for a declaration was dismissed notwithstanding it could prove that payments were made to the developer.

(q) In *Buxton*, the Supreme Court exercising its appellate jurisdiction held that the bank was under no duty to enquire where the moneys paid into the single account of the charger came form. However it would have been a simple matter to make provisions for the purchasers to pay direct to the bank and not to the charger.

(r) In the present case, there is such a provision in the S & P to require the plaintiff to pay the proceeds of sale to the second defendant's account with TAIB. Indeed the progress payment request letters even provided the account details for the purposes of this provision. Why did the purchasers fail to comply with the provisions of the S & P. There is no room for the argument that the developer/vendor in this case acted as constructive trustee for the purchaser as equity clearly cannot come in aid of a party which has breached an agreement. Harun SCJ further held:

> Next it was argued that ... the annexure to the chargor has obtained the prior consent of the respondent for the sale of the apartments. ... No such written consent was obtained in respect of Apartments 2A and 2B. ... It is contended that the chargor was a bare trustee of the apartments for the appellants who are the true beneficial owners. The respondent had knowledge or means of knowledge of that trust and was in possession of the moneys paid by the beneficiary under the trust ...
>
> We are unable to accept this contention. As no written consent was obtained by the chargor before the sale of Apartments 2A and 2B to the appellants, it cannot confer any rights or interests in the appellants against the respondent. The appellants had made the final payments for their apartments on 30 October 1984 but even if such moneys were paid to the respondent (the bank), it does not make them a constructive trustee of the appellants. They just did not know that part of the moneys had come from the appellants. In any event there was no evidence that the moneys paid by the appellants to the chargor were paid over to the respondent.

(s) Therefore for the reasons advanced above, the plaintiff's application for declaration that it is the beneficial owner of shops unit 32 and 33 is untenable for the following reasons:

(i) his claim is subject to a prior absolute assignment in favour of TAIB;

(ii) TAIB has obtained an absolute assignment of the second defendant's right before the latter entered into the S & P with the purchaser;

(iii) the S & P was entered into without the written consent of TAIB;

(iv) he has not discharged his contractual obligation under the S & P to make payments of the proceeds of sale to a specific account of the second defendant with TAIB, save for the amount of $85,000 out of $485,000; and

(v) equity should not come in aid of a party which has breached an agreement.

(t) The plaintiff's application for an order to compel the first and the second defendants to transfer the said shop units is untenable because it does not address the value of the purchase price still payable to TAIB. Further the purported escrow sublease granted by the second defendant in favour of the plaintiff was made subsequently to the absolute assignment in favour of TAIB; was executed without the written consent of TAIB and as such the second defendant had no right in law to grant the sublease in favour of the plaintiff.

DECISION

**[25]** It is not in dispute that the S & P agreement dated 22 October 2003

between the plaintiff and Morsima Sdn Bhd (the second defendant) was signed after the assignments in favour of TAIB (the first defendant) on 20 April 2002 by Morsima. In this case, TAIB has obtained an absolute assignment of the second defendant's rights before the second defendant entered into the S & P agreement with the plaintiff. The plaintiff's counsel, however, submitted that the assignment between TAIB and Morsima cannot prejudice the plaintiff because TAIB did not give the required notice of assignment to the plaintiff. It would be impossible to give notice to the plaintiff on 20 April 2002 when the second defendant assigned to the first defendant, because the plaintiff, only signed the S & P agreement, later on 22 October 2003. In England, s 136 of the Law of Property Act 1925 provides that:

> (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice —
>
> (a) the legal right to such debt or thing in action;
>
> (b) all legal and other remedies for the same; and
>
> (c) the power to give a good discharge for the same without the concurrence of the assignor:
>
> Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice —
>
> (a) that the assignment is disputed by the assignor or any person claming under him; or
>
> (b) of any other opposing or conflicting claims to such debt or thing in action;
>
> he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act 1925.

**[26]** We do not have a similar provision in Brunei. However, this does not affect the right to make an equitable assignment of a chose in action, for which no particular form is required and notice is unnecessary.

WHICH OF THE PARTY HAS THE BETTER EQUITY?

**[27]** *Clause 2 of the assignment of development agreement* in favour of TAIB dated 20 April 2002 stated that for the consideration aforesaid the assignor as beneficial owner and as a continuing security for payment of all payment of all amount drawn and outstanding and all other sums payable in respect of the

facilities and with the consent of the attorney of the registered owner HEREBY assigns to Perbadanan absolutely all the assigned rights, title and instituting under the deed of the assignment.

**[28]** *Clause 4(iv) of the assignment of development agreement in favour of TAIB dated 20 April 2002* provided that the assignor (the second defendant) should not without the consent in writing of TAIB, sell, lease etc the said properties to any person.

**[29]** *Clause 4.4 of the deed of assignment of leasehold rights dated 20 April 2002* provided that the assignor (the second defendant) covenanted with TAIB that it would not sublease the property without the consent in writing of TAIB.

**[30]** The preamble E to the S & P dated 22 October 2003 stated:

> By a Deed of Assignment of Development Agreement (Developer's Share), Deed of Assignment (Rentals and Sale Proceeds), Deed of Assignment of Leasehold Rights (By way of security) all dated 20th April 2002 and other documents entered into between the Vendor and Perbadanan ... In consideration for financing facility extended to the Vendor by Perbadanan ... *Perbadanan Tabung Amanah Islam Brunei is entitled to by way of security the Vendor's rights and benefits under the Development Agreements and the Developer's share*.

**[31]** *Clause 6.4 of the S & P dated 22 October 2003* stated:

> All payments by the Purchaser (Plaintiff) towards the Purchase Price shall be made to the Vendor's account with Perbadanan Tabung Amanah Islam Brunei.

**[32]** *Clause 6.5 of the S & P dated 22 October 2003* stated:

> No change of the account to which the payments are to be made is valid unless consented to in writing by Perbadanan Tabung Amanah Islam Brunei.

**[33]** At law, as in equity, the basic rule is that rights and interests primarily rank in order of creation. Therefore, the plaintiff's claim is subject to a prior absolute assignment in favour of TAIB. An important qualification to the basic rule is the doctrine of the purchaser without notice. A subsequent purchaser must have no notice of the earlier equitable interest. From this doctrine it is clear that a subsequent purchaser is affected by notice of an equity when there is actual notice, constructive notice and imputed notice.

**[34]** In the case of *Bank of Tokyo Ltd v Mohd Zaini Bin Arshad (Maria Pragasam, intervenor)* [1991] 3 MLJ 50, the developer purchased land, obtained loan and assigned interests in the agreement to the bank. The

developer subsequently sold the property to a purchaser. A subsequent purchaser was held to be affected by notice of an equity when there is actual, constructive or imputed notice on his part. The intervenor (subsequent purchaser) had had actual notice of the assignment in favour of the bank as manifested in the recital of the agreement between the developer and the intervenor (the subsequent purchaser). The court ruled that the plaintiff (the bank) had better equity than the subsequent purchaser.

**[35]** Similarly in this case the plaintiff had actual notice of the assignment by Morsima (the second defendant) in favour of TAIB as shown in the preamble E of the S & P which states that in consideration for financing facility extended to Morsima by TAIB, TAIB is entitled to by way of security the vendors (Morsima) rights and benefits under the development agreement and the developer's share.

**[36]** The plaintiff's counsel also submitted that TAIB is estopped from claiming priority because TAIB allows Morsima to act as its agent and trustee. In this case the plaintiff failed to pay the purchase money to Morsima's account with TAIB as required by the S & P agreement dated 22 October 2003 (save for the amount of $85,000 out of $485,000). The progress payment request letters even provided the account details for the purposes of this provision. The plaintiff therefore was in breach of the agreement. TAIB as principal is not liable to the plaintiff for what its agent, Morsima, did. The plaintiff should have known that payment should be made to Morsima's account with TAIB. Morsima would have exceeded its power when accepting the plaintiff's cheques not payable to its own account with TAIB. The plaintiff should have known Morsima had exceeded its power as agent. The plaintiff's conduct in not complying with the provision of the S & P agreement would mean the plaintiff does not deserve to be saved by equity. TAIB should not therefore be estopped from claiming priority. The plaintiff and Morsima had also failed to obtain consent from TAIB for the sale or lease or sublease of the properties as required by the assignment of development agreement and the deed of assignment of leasehold rights. As submitted, equity clearly cannot come in aid of a party which had breach the agreement.

**[37]** For the above reasons TAIB (the first defendant) has an equity which is better than that of the plaintiff. I therefore dismiss the plaintiff's application. The costs of this application shall be paid by the plaintiff to the defendant.

*Plaintiff's application dismissed with costs.*

Reported by Andrew Christopher Simon